14 (2)

No. 08-593

Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN F. KILGROE,

Petitioner,

v.

AMERICAN SHIP MANAGEMENT, LLC; PATRIOT CONTRACT SERVICES, LLC; SAILORS UNION OF THE PACIFIC; and MARINE FIREMEN'S UNION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner seeks *certiorari* because he disagrees with the lower courts' factual findings and application of settled legal standards in this employment and labor law case. Respondents submit the following Counter-Statement of Questions Presented to appropriately characterize the true nature of the review that Petitioner seeks.

1. Whether the Ninth Circuit Court of Appeals applied well-settled law in affirming summary judgment in favor of Respondents on Petitioner's breach of labor contract, age, and disability discrimination claims under Federal Rule of Civil Procedure 56(c).

LIST OF PARTIES IN COURT BELOW

1. John F. Kilgroe
2. APL Marine Services, Ltd.
3. American Ship Management, LLC
4. Patriot Contract Services, LLC
5. Sailors Union Of The Pacific
6. Marine Firemen's Union

CORPORATE DISCLOSURE STATEMENT

Patriot Contract Services, LLC owns 100% of American Ship Management, LLC. There is no parent or publicly held company owning 10% or more of the stock of Patriot Contract Services, LLC.

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OPINIONS BELOW

The District Court's Opinion and Order granting summary judgment to Respondents is unreported and is included at pages 4-16 of the Appendix to the Petition.

The Judgment Order of the Ninth Circuit Court of Appeals affirming the District Court's Opinion and Order granting summary judgment to Respondents is unreported and is included at pages 1-3 of the Appendix to the Petition.

STATUTES AND OTHER PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56(c) provides in relevant part: "[Summary judgment] should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains inaccuracies and immaterial allegations and omits critical undisputed facts. The following Statement of the Case accurately reflects the relevant portions of

the undisputed factual record, as well as the lower courts' decisions.

A. The Parties

From 1999 through 2005, Patriot Contract Services, LLC ("PCS") operated Large Medium Speed Roll-on Roll-off ("LMSR") ships for the U.S. Navy Military Sealift Command. Statement of Undisputed Facts (hereinafter "SUF") 2 (Excerpts of Record (hereinafter "ER") 701, 734, 745). The LMSR vessels have multiple levels and ramps so that cars, humvees, tanks, and other military cargo can be loaded efficiently and transported throughout the world. SUF 3 (ER 701, 734, 756-757). The USNS SEAY is a LMSR, and was formerly operated by PCS. SUF 4 (ER 702).

Petitioner was a member of the Sailor's Union of the Pacific ("SUP"), but through arrangements between SUP and Marine Firemen's Union ("MFU"), Petitioner was dispatched by MFU to work on the SEAY in January 2003. SUF 5 (ER 702, 734). Before he worked on the SEAY, Petitioner went through a physical examination on January 8, 2003, and he was deemed fit for employment. SUF 6 (ER 702, 748-749, 987-988). Petitioner's examining doctor did not report anything about hyperactive disorder or any learning disability to PCS or ASM, nor did Petitioner disclose any alleged disability. SUF 7 (ER 702-703, 751, 841-860). Petitioner started working on the SEAY on January 10, 2003. SUF 8 (ER 703, 752).

B. Petitioner's Employment

1. Petitioner's Duties Aboard The SEAY And Required Attention To Safety

Petitioner was a "wiper" in the engine department of the SEAY. SUF 9 (ER 703, 808, 934). As a "wiper," Petitioner spent most of his time sweeping, mopping, wiping oil, general cleaning, and carrying heavy objects. Wipers are entry level positions and work at the discretion of the first engineer, who, in respect to Petitioner, was Vint. SUF 10, 18 (ER 703, 705-706, 758-760, 808). Vint reported to the chief engineer, Wood. SUF 19 (ER 706, 761, 933-934). Petitioner's essential job duties required him to be in the engine room. SUF 14 (ER 704, 827).

The engine room of the SEAY is actually a series of interconnected rooms containing the four main 14,000 horsepower engines, generators, steam-generating equipment, pumps and many other pieces of machinery. SUF 11 (ER 703-704, 824-825). The engine room also contains moving pieces of machinery, superheated surfaces, electrical equipment and high pressure fuel and hydraulic oil pipelines. SUF 12 (ER 704, 825). Employees in the engine room had to take things seriously, be constantly aware of what was going on around them, and concerned with safety at all times. SUF 13 (ER 704, 825-826). Safety meetings were held aboard the SEAY once a week or once every two weeks. Drills and training exercises were also held as part of the ship's safety protocol. SUF 16 (ER 705, 754-755). Participating in emergency drills

are considered an essential function of everyone on board the SEAY, and every employee had assignments to fulfill during emergencies. SUF 15 (ER 704-705, 822). Safety is a big issue on a ship because "you don't have access to medical treatment like you do ashore," and because "it's a hazardous environment to begin with," and "more so if you have someone who's not aware of their surroundings." SUF 17 (ER 705, 825-826, 970).

2. Petitioner's Performance Was Unsatisfactory And He Put Himself And His Crewmates In Danger

Shortly after Petitioner boarded the SEAY, Vint and Wood concluded Petitioner had no mechanical aptitude. Petitioner had difficulty following even the most rudimentary instructions, and during his entire voyage, Petitioner's performance was unsatisfactory, even abysmal. SUF 20 (ER 706, 935-939, 961-962, 980-981). They concluded Petitioner failed to even grasp how to properly mop the floor, and Petitioner did not know what an adjustable wrench was. SUF 21 (ER 706-707, 936-938, 961-962). Additionally, as Petitioner admits, he had memory problems while aboard the SEAY. SUF 23 (ER 707, 739, 963-964). For example, Petitioner had difficulty remembering his assigned tasks and his duty stations on the ship (places he was to report during fire and boat drills, and to which lifeboat and emergency gear locker he was assigned). SUF 23 (ER 707, 739, 963-964). It could be disastrous if Petitioner failed to report to his

duty station because all the crew has specific responsibilities during emergencies. SUF 24 (ER 707, 971-973). Also, Petitioner could not perform his job as a wiper without constant supervision. SUF 22 (ER 707, 939-942, 950, 953, 974-975). There are only 11 people in the engine department and when one person must constantly assist Petitioner, productivity significantly decreases and safety is compromised. SUF 25 (ER 708, 823-824, 951-952, 965). Because the SEAY's engine room is a very dangerous environment, Petitioner placed himself and the other people in the department in jeopardy with his lackadaisical approach to safety and inability to sense danger in his surroundings. SUF 26 (ER 708, 938-939, 941-942, 953, 966). On March 10, 2003, Vint prepared an employee evaluation of Petitioner which highlighted that Petitioner's performance on the SEAY was not satisfactory, and that Petitioner posed a safety concern to himself and his fellow crewmembers. SUF 27 (ER 708, 763-764, 862-864, 959-960, 967-970, 980-981, 943-946, 955).

3. Petitioner Voluntarily Left The SEAY, And Was Deemed Ineligible For Rehire Because Of Safety Concerns

Petitioner voluntarily left the SEAY on March 11, 2003 when the ship ended its voyage from Kuwait to Beaumont, Texas. SUF 28 (ER 709, 737-738, 746-747, 753, 862-864, 976). On March 15, 2003, Wood sent an email to ASM's personnel department summarizing his perceptions of Petitioner's employment

performance and the danger he poses to himself and others. SUF 29 (ER 709, 941-942, 953). In his March 15, 2003 email, Wood recommended that Petitioner "not sail again in the engine department of any ship where he is exposed to constantly moving equipment." SUF 30 (ER 709-710, 941-942, 953). On April 14, 2003, Archie Morgan ("Morgan"), ASM's then Senior Manager Labor Relations, sent a copy of Petitioner's performance evaluation to Tony Poplawski ("Poplawski") of MFU, and advised Poplawski that PCS "will exercise it's [sic] right of select [sic] to reject Mr. Kilgore [sic] for future assignments aboard LMSR's out of concern for his own personal safety and the safety of others." SUF 31 (ER 710, 763-765, 862-864, 984-986, 990). After his service on the SEAY ended in March 2003, Petitioner has not worked on any other ships run by PCS or ASM. SUF 31 (ER 710).

4. Petitioner's Request For Union Membership And Class C Status, And The Denial Of His Request

Pursuant to Section 50B of the Shipping Rules contained in the collective bargaining agreement ("CBA") between ASM and MFU, for an individual to receive a Class C designation, the person must have completed ten (10) days of satisfactory service. SUF 33 (ER 711, 762-763, 861, 993-1004). On April 7, 2003, Petitioner prepared a request for union membership and Class C status under 50B. SUF 34 (ER 711, 762, 1000). On April 14, 2003, after reviewing

Petitioner's work reports, the Joint Classification Committee denied Petitioner's request for union membership and Class C status because Petitioner did not have sufficient days of satisfactory service. SUF 35 (ER 711, 766, 865, 947-948).

C. Petitioner's National Labor Relations Board (NLRB) Charges, Demand For Arbitration, Union Grievance, and Equal Employment Opportunity Commission (EEOC) Charge

1. NLRB Case No. 21-CB-13431

On June 9, 2003, Petitioner filed a charge with the National Labor Relations Board ("NLRB") (Case No. 21-CB-13431) against MFU concerning the denial of Class C status and union membership. SUF 37 (ER 712, 768-771, 869-872). On about August 20, 2003, the NLRB dismissed Petitioner's charge because the "employer had been dissatisfied with [Petitioner's] work performance and that the Union had been aware of [Petitioner's] employer's view of [Petitioner's] performance . . . accordingly, there's insufficient evidence that the Union's conduct was based upon any unlawful considerations." SUF 38 (ER 712-713, 768-771, 869-872).

2. NLRB Case No. 21-CA-35897

On August 21, 2003, Petitioner filed another charge with the NLRB (Case No. 21-CA-35897) alleging that ASM and PCS "terminated" him "by

placing [him] on a 'no-hire list.'" SUF 39 (ER 713, 771-773, 873). On October 27, 2003, the NLRB denied and dismissed this charge filed against ASM because it found that "the employer refused to 'hire' [Petitioner] because of concern about [Petitioner's] ability to satisfactorily perform work." SUF 42 (ER 714, 775-777, 1005-1007). Petitioner appealed the NLRB's October 27, 2003 decision, and on or about December 8, 2003, the NLRB denied Petitioner's appeal. SUF 43 (ER 715, 780-781). The NLRB's denial of Petitioner's appeal was based, in part, on the conclusion that "the employer's refusal to re-employ [Petitioner] was based on [his] prior work performance." SUF 44 (ER 715, 781-782, 892-893).

3. Petitioner's Demand For Arbitration

On December 8, 2003, Petitioner, ASM and PCS participated in final and binding arbitration of Petitioner's issues concerning Class C status and union membership before Arbitrator Thomas Angelo (the "Arbitrator"). SUF 45 (ER 715, 734, 736-739, 778, 880-891). On March 16, 2004, the Arbitrator denied Petitioner's grievance ultimately finding Petitioner did not satisfactorily complete ten days of service aboard the SEAY, and thus, he was not eligible for Class C status and union membership. SUF 49 (ER 716, 778-779, 880-891). Petitioner sought reconsideration of the Arbitrator's decision, and on May 10, 2004, the Arbitrator denied Petitioner's request for reconsideration. SUF 52 (ER 717, 785-786, 895-896). On June 3, 2004, the Court dismissed Petitioner's complaint he had filed with the District Court to

compel arbitration noting that the arbitration was held, and the Arbitrator's decision denying Petitioner's grievance constitutes a "binding decision on the merits." SUF 53 (ER 718, 786, 897-898).

4. NLRB Case No. 21-CA-36290

On May 6, 2004, Petitioner filed a third NLRB charge (Case No. 21-CA-36290) against ASM again alleging ASM "terminated [Petitioner] by placing [him] on a no-hire list." SUF 51 (ER 717, 783-784, 894). On or about June 30, 2004, the NLRB dismissed Case No. 21-CA-36290, again finding that Petitioner's employer "had been dissatisfied with [Petitioner's] work performance." SUF 54 (ER 718, 786-787, 899-901).

Petitioner appealed the dismissal of all his NLRB charges. On September 17, 2004, the Office of the General Counsel for the NLRB denied Petitioner's appeal of all his NLRB charges, and also found that "the Arbitrator concluded that the union's and employer's actions were in accordance with contractual provisions." The Office of General Counsel also noted: "the mere fact that you disagree with the employer's and the union's interpretations of the facts and the relevant contractual provisions does not establish that a violation of the Act occurred." SUF 55 (ER 718-719, 794-796, 906-907).

Petitioner acknowledges that ASM and PCS, the Arbitrator, and the NLRB all concluded that his poor and unsafe performance was the reason he was

considered not eligible for rehire. SUF 69 (ER 724, 818).

5. Petitioner's Grievance In 2004 And SUP's Decision Not To Pursue It

On November 30, 2004, Petitioner was dispatched by the SUP to a PCS-operated ship, but was not accepted for employment. SUP notified ASM of a grievance on Petitioner's behalf. SUF 56 (ER 714, 788-789, 902-903). On April 5, 2005, ASM sent a letter to Petitioner confirming that Petitioner is "permanently ineligible for hire with [ASM] or [PCS], due to [his] inability to satisfactorily to perform the work assigned to [him], and due to the danger [he] pose[s] to [him]self and [his] fellow crewmembers." SUF 57 (ER 719-720, 790-792, 904-905). On April 14, 2005, SUP informed Petitioner that it declined to pursue his November 30, 2004 grievance because it determined, after conducting an investigation, that Petitioner was "unable to perform simple tasks such as sweeping or mopping and, moreover, [he] routinely demonstrated unsafe behavior that put both [him]self and shipmates at risk." SUF 58 (ER 720, 796-798, 908). In its April 14, 2005 letter, SUP incorrectly stated that Petitioner "had been discharged for cause from a Company vessel on March 11, 2003." SUF 59 (ER 721, 796-798, 908). By letter dated April 27, 2005, Petitioner informed SUP that he was not discharged for cause from a Company vessel, and on May 10, 2005, SUP acknowledged and corrected its

erroneous conclusion to the contrary. SUF 60 (ER 721, 829-830, 911).

Petitioner only grieved under the CBA his denial of Class C status and his deprivation of deck department jobs. SUF 72 (ER 725, 774, 793, 819-821).

6. Petitioner's Charge Of Discrimination Filed With The EEOC

On November 14, 2005, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging age and disability discrimination, and retaliation. SUF 61 (ER 721-722, 798-800, 909). In his EEOC charge, Petitioner states he has been aware of his alleged disability since 1999. SUF 64 (ER 722, 802-804, 909). Petitioner's alleged disabilities are "attention deficit hyperactive disorder and also learning disabilities formerly called dyslexia." He also claims he has an "I.Q. of 55 and has short-term visual memory problems." SUF 65 (ER 722-723, 802-804, 909).

In his EEOC charge, Petitioner alleged the earliest and latest dates of discrimination took place on April 1, 2005. He based this date upon the letter dated April 5, 2005 he received which notes Petitioner was permanently ineligible for rehire. SUF 62 (ER 722, 801, 904-905, 909). Petitioner also alleged on his EEOC charge that he was discharged in April 2005, but he admits that he did not work for ASM or PCS at any time in 2005. SUF 63 (ER 722, 805-807, 909). On February 16, 2006, the EEOC dismissed Petitioner's

charge "because it was not filed within the time limit required by law." SUF 67 (ER 715-716, 828-829, 910).

D. The United States Coast Guard's Investigation Of Petitioner

Meanwhile, in mid-February 2004, Petitioner learned that the United States Coast Guard was investigating his fitness to serve in the Merchant Marine. SUF 46 (ER 715-716, 831-832). On March 30, 2004, a formal complaint by the Coast Guard was brought against Petitioner and was later heard by an ALJ who revoked Petitioner's wiper endorsement by finding Petitioner was unable to safely perform his required duties aboard the SEAY from January 10, 2003 to March 10, 2003. SUF 50 (ER 716-717, 833-834, 837). Petitioner has no personal knowledge of whether anyone from ASM or PCS provided Petitioner's name to the Coast Guard for investigation. SUF 47 (ER 716, 815-817).

On or about January 9, 2006, the Vice Commandant of the United States of America Department of Homeland Security, United States Coast Guard, affirmed the ALJ's decision, and stated that "a wiper who cannot safely perform his required duties is not professionally competent," and that the ALJ's finding was supported by substantial evidence. SUF 66 (ER 723, 835-839, 913-930).

E. Petitioner's Other Admissions And Other Uncontroverted Evidence

Petitioner claims he was unable to get jobs at the union, but has no knowledge or information that Respondents had anything to do with that situation. SUF 68 (ER 724, 812-814). Petitioner admits no one at ASM or PCS acted with intention to cause him harm. SUF 70 (ER 724, 811). Respondents did not receive any information about Petitioner's alleged disabilities until the December 8, 2003 arbitration hearing. SUF 75 (ER 725, 752). Indeed, when they worked with Petitioner, Vint and Wood were not aware Petitioner had any disability of any type. SUF 73 (ER 725, 948-949, 977-978). Morgan likewise knew nothing of Petitioner's alleged disability when he determined Petitioner was ineligible for rehire. SUF 74 (ER 725, 989). Petitioner does not know the reason he was "terminated." SUF 71 (ER 724, 809-810).

F. Petitioner's Claims

Petitioner filed his initial Complaint on October 11, 2005, and his Amended Complaint on April 4, 2006. Excerpts of Record (ER) 2-23. The Amended Complaint alleged the following claims: (1) Breach of Labor Contract (29 U.S.C. §185); (2) Breach of Duty of Fair Representation (29 U.S.C. §§151 et seq.); (3) Violation of the American's With Disabilities Act (42 U.S.C. §12101, Cal. Gov't Code §12940); (4) Age Discrimination (29 U.S.C. §216(B), Cal. Gov't §12940); (5) Fraudulent Misrepresentation; (6) Defamation;

(7) Malicious Prosecution; (8) Abuse of Process; and (9) Tortious Discharge in Violation of Public Policy.

G. The District Court Dismisses Four Of Petitioner's Claims Under Federal Rule Of Civil Procedure 12(b)(6)

On April 17, 2006, Respondents filed a Rule 12(b)(6) Motion requesting the District Court dismiss claims 5, 6, 7, and 8. ER 24-42. On May 15, 2006, the District Court granted Respondents' motion and dismissed claims 5, 6, and 8, with prejudice and claim 7 without prejudice. ER 43-47.

H. The District Court Grants Summary Judgment On Petitioner's Five Remaining Claims Under Federal Rule Of Civil Procedure 56

Respondents filed their Motion for Summary Judgment or Partial Summary Judgment as to Petitioner's remaining claims (1, 2, 3, 4, and 9) on August 21, 2006. ER 501-504. The Court granted the Motion on October 19, 2006. ER 572-578. The Court entered final judgment in favor of Respondents on November 2, 2006.

I. The Ninth Circuit Court Of Appeals Affirms Summary Judgment

Petitioner filed a Notice of Appeal from the District Court's final judgment. The Ninth Circuit

Court of Appeals affirmed the judgment. The Ninth Circuit held that the District Court properly granted summary judgment on Petitioner's age discrimination claim, because Petitioner did not raise a triable issue that Respondents' proffered nondiscriminatory reason for refusing to hire him was pretext for age discrimination. (App. 3). It held that the District Court properly granted summary judgment on Petitioner's disability discrimination claim, because Petitioner did not raise a triable issue that he would have been able to perform the essential functions of his position with a reasonable accommodation. (App. 3.) The Ninth Circuit held that Petitioner's remaining contentions were unavailing. (App. 3.) The Ninth Circuit also held that the District Court properly dismissed Petitioner's defamation, abuse of process, and fraudulent misrepresentation claims. The Ninth Circuit issued a mandate under Federal Rules of Appellate Procedure 41(a), and Petitioner filed a motion to recall the mandate. Petitioner's motion to recall the mandate was denied on the ground that Petitioner failed to timely file a petition for rehearing.

J. Petitioner Files A Petition For Writ Of *Certiorari*.

Petitioner filed a Petition for Writ of *Certiorari* in this Honorable Court on October 30, 2008. The Petition was docketed on October 31, 2008.

Petitioner seeks review of summary judgment rendered under Federal Rule of Civil Procedure 56(c).

Petitioner does not seek review of the dismissal of claims under Federal Rule of Civil Procedure 12(b)(6).[1]

REASONS FOR DENYING THE PETITION

I. THE CRITERIA OF SUPREME COURT RULE 10 ARE NOT SATISFIED.

This Court has complete discretion in determining whether to grant a petition for writ of *certiorari* and will grant a petition only for compelling reasons. Sup. Ct. R. 10. Review of the Ninth Circuit's decision to affirm summary judgment in favor of Respondent is appropriate, for example, only if the decision

[1] Petitioner does not seek review of the dismissal of his defamation, abuse of process, and fraudulent misrepresentation claims under Federal Rule of Civil Procedure 12(b)(6). Petitioner does not reference his defamation, abuse of process, and fraudulent misrepresentation claims in his Petition. Sup. Ct. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Indeed, Petitioner states in his Petition that claims *other than* breach of labor contract, breach of duty of fair representation, disability discrimination, age discrimination, and tortious discharge in violation of public policy are "no longer urged." Petition at 2. Furthermore, Petitioner did not attach the District Court's Federal Rule of Civil Procedure 12(b)(6) dismissal order to his Petition. *See* Sup. Ct. R. 14(i) (requiring attachment of the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed). Nonetheless, Respondents contend that writ review is not appropriate and that dismissal of those claims was correct.

conflicts with a decision of another United States court of appeals or is a departure from the accepted and usual course of judicial proceedings, or if the Ninth Circuit decided an important, unsettled, question of federal law in conflict with decisions of this Court. *See* Sup. Ct. R. 10. As a general rule, a petition that complains of "erroneous factual findings" or "the misapplication of a properly stated rule of law" will not suffice. Sup. Ct. R. 10. The circumstances under which the Supreme Court will consider granting *certiorari* do not exist in this case.

A. The Ninth Circuit Did Not Decide A Federal Question In A Way That Conflicts With Decisions Of Other Courts Of Appeals.

Petitioner does not and cannot argue that the Ninth Circuit decided a federal question in a way that conflicts with the decisions of another court. Consistent with the Federal Rules of Civil Procedure and U.S. Supreme Court authority, the Ninth Circuit holds that summary judgment for a defendant is appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to plaintiff's case on which plaintiff will bear the burden of proof at trial. To avoid summary judgment, the plaintiff's evidence must be sufficient to create a genuine issue of fact that is material to the outcome of the suit. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885, 888 (9th Cir. 2003); *Coleman v.*

Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9th Cir. 2000). Inferences drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992); *KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004) ("We . . . construe all reasonable inferences in favor of the nonmoving party, as we do when reviewing other motions for summary judgment").

B. The Ninth Circuit Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings.

Petitioner has not and cannot show that the Ninth Circuit far departed from the accepted and usual course of judicial proceedings. The Ninth Circuit correctly applied established law under Federal Rule of Civil Procedure 56(c). The Ninth Circuit did nothing more than correctly apply settled rules of law to decide that Petitioner's claims could not survive summary judgment. *See* App. 3 (Ninth Circuit order explaining why summary judgment was properly granted on Petitioner's age and disability discrimination claims). The Ninth Circuit did not weigh the material evidence and did not assess the credibility of witnesses as to the material facts. It did not fail to draw reasonable inferences on material matters in favor of Petitioner. Accordingly, the Ninth Circuit

applied well-settled law of Federal Rule of Civil Procedure 56(c) in affirming the District Court's decision to grant summary judgment.

C. The Ninth Circuit Did Not Decide An Important Question Of Unsettled Federal Law In This Case.

Petitioner makes no effort to argue that the Ninth Circuit decided an important question of unsettled federal law in this case. Indeed, it did not. The only question of federal law raised by Petitioner – the basic summary judgment standard under Federal Rule of Civil Procedure 56(c) – is firmly established across the federal courts. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. at 322. Moreover, because the District Court's and Ninth Circuit's opinions are unreported, they lack precedential value. Accordingly, no important federal question of unsettled law exists in this case.

D. Petitioner's Argument The Ninth Circuit Relied On Erroneous Factual Findings Or Misapplication Of Law Is Insufficient Ground For Review.

Instead, Petitioner asserts, in summary, that the Ninth Circuit's decision consists of erroneous factual findings or the misapplication of a properly stated rule of law. For example, Petitioner contends that the Ninth Circuit, "ignor[ed]" evidence in his favor and misapplied the statute of limitations to the facts of

the case. Petition at 1. Even if Petitioner's contentions were true (they are not), such are insufficient reasons for review. Sup. Ct. R. 10.

Petitioner is simply dissatisfied with how the Ninth Circuit and the District Court applied the rule of law (under Federal Rules of Civil Procedure 56(c)) that has been universally accepted. Practically speaking, Petitioner seeks *certiorari* for no other reason than to have this Court wade through the record in search of a triable claim that both the Court of Appeals and District Court could not find. This is far from a compelling reason for this Court's review under Supreme Court Rule 10, and the Petition should be denied in its entirety.

II. THE NINTH CIRCUIT'S AND DISTRICT COURT'S DECISIONS TO GRANT SUMMARY JUDGMENT WERE CORRECT.

A. Summary Judgment On Petitioner's Age Discrimination Claim Was Correct.

The Ninth Circuit and District Court correctly concluded that Petitioner failed to raise a triable issue that Respondents' proffered nondiscriminatory reason for refusing to hire him was pretext for age discrimination. App. 3, 13-15; *see Coleman v. Quaker Oats Co.*, 232 F.3d at 1282 (explaining that to survive summary judgment, a plaintiff must create a triable issue as to whether the employer's proffered reasons

for the adverse employment action were pretext for age discrimination). ER 576-577.

Respondents presented sufficient evidence that they refused to hire Petitioner because his performance on the SEAY was unsatisfactory. Petitioner, however, submitted no evidence that raised a genuine material issue of fact as to whether the justification provided is a pretext for age discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2747-49 (1993), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

Petitioner speculates that, because Respondents never filed a grievance concerning his performance on the SEAY, something other than his performance, like his age, was why he was deemed ineligible for rehire. Petition at i, 6. Such unsupported speculation cannot avoid summary judgment. *National Steel Corp. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995). ASM and PCS had no duty to file such a grievance under the CBA. Rather, ASM and PCS had the absolute right to approve or reject crewmembers proffered by the unions to staff the ships SUF 31 79 (ER 710, 727-728). Accordingly, review of Petitioner's age discrimination claim should be denied.

B. Summary Judgment On Petitioner's Disability Discrimination Claim Was Correct.

The Ninth Circuit and District Court properly decided that Petitioner failed to raise a triable issue that he would have been able to perform the essential functions of his position with a reasonable accommodation. App. 3, 10-13, 15; *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) (explaining that a plaintiff making a claim under the Americans with Disabilities Act bears the burden of proving that a reasonable accommodation would have enabled him to perform the essential functions of the position).

Petitioner is not a qualified individual with a disability as defined by the Americans with Disabilities Act or state statute. ER 574-576. Petitioner cannot prove that he was qualified for the wiper job with or without a reasonable accommodation. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Fred Ford v. Tosco Ref. Co.*, 2001 WL 1006813 (N.D. Cal. 2001). Moreover, Petitioner did not ask for (nor was he entitled to) any accommodation. As Wood and Vint concluded, Petitioner required constant supervision and needed a fellow employee to follow him around to ensure tasks were completed. The strain on the eleven-person engine department crew would have posed performance and safety issues since two employees were required to perform Petitioner's duties as a wiper. Consequently, such an "accommodation" would have posed an undue burden upon the SEAY, and thus, Petitioner was not entitled

to it. 29 C.F.R. § 1630.9(a); 42 U.S.C. § 12112(b)(5); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1237 (9th Cir. 1999), *cert. denied*, 530 U.S. 1243 (2000).

Furthermore, Petitioner posed a safety threat to himself and others aboard the SEAY. Indeed, the Coast Guard revoked Petitioner's mariners license for this very reason. And, the union, NLRB, and Arbitrator all upheld the determination that Petitioner should not be eligible for rehire because he posed a safety risk. Respondents lawfully refused to rehire Petitioner based on the safety risk he posed to himself and others. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002); *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884 (9th Cir. 2001).

Petitioner contends that he had "direct evidence" of discrimination. Specifically, Petitioner alludes to evidence that on April 5, 2005, ASM sent a letter to Petitioner confirming that Petitioner is "permanently ineligible for hire with [ASM] or [PCS], due to [his] inability to satisfactorily to perform the work assigned to [him], and due to the danger [he] pose[s] to [him]self and [his] fellow crewmembers." SUF 57 (ER 719-720, 790-792, 904-905). The Ninth Circuit and District Court deemed this evidence insufficient to overcome the conclusion that Petitioner was not qualified to perform his job even with accommodation. Petitioner points to *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1039 (9th Cir. 2005) in arguing that the letter is sufficient evidence of discrimination. In that sex discrimination case, however,

the evidence showed that a supervisor remarked "he was going to hire a man for the . . . position," inferring that he would not hire a woman. *Id.* Here, the letter at issue does not contain such evidence of unlawful conduct. As explained above, Petitioner cannot prove that he was qualified for the wiper job with or without a reasonable accommodation. Accordingly, review of Petitioner's disability discrimination claim should be denied.

C. Summary Judgment On Petitioner's Breach Of Labor Contract Claim Was Correct.

Petitioner's breach of labor contract claim is barred by the six-month statute of limitations. The District Court's analysis concerning the issue of the six-month statute of limitations is exhaustive and compelling. App. 6-9.

In addition to the reasons set forth in the District Court's order, Petitioner's argument leads nowhere because Petitioner failed to exhaust his exclusive grievance/arbitration remedy. Section 10 of the applicable CBAs between ASM, SUP and MFU provides for a grievance procedure which culminates with final and binding arbitration. (SUF 76) Additionally, pursuant to Section 49 of the Shipping Rules of the applicable CBA, grievances by "a person on the non-seniority list [like Petitioner] asserting a contract violation regarding his employment relating to registration, dispatching, shipping, or rejection, shall be

filed within ten days of the incident giving rise to the grievance . . . " and " . . . if the grievance is not filed . . . within the time required, it may never be raised." (SUF 77) And, pursuant to Section 60 of the Shipping Rules of the applicable CBA between ASM and MFU, if an aggrieved person is not satisfied with the decision of the Appeals Board concerning shipping and seniority rights, the matter will be resolved by a final and binding proceeding before a Referee. (SUF 78) Here, Petitioner admits he only grieved his denial of Class C status/union membership and denial of decking job. (SUF 72). All other claims that ASM or PCS breached the CBA are barred because Petitioner failed to follow the unequivocal language of the CBA. For example, Petitioner admits he did not grieve his claim that ASM or PCS failed to inform him of the Coast Guard investigation. (SUF 48).

It is well-settled that because the CBA had a binding grievance arbitration provision, those "procedures are presumed to be Petitioner's exclusive remedy unless the contract expressly provides that they are not." *Riggs v. Continental Baking Co.*, 678 F. Supp. 236, 239 (N.D. Cal. 1988), *citing Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965). In this case, the CBA does not provide that additional remedies are available to an aggrieved employee. Rather, the agreement specifically provides for binding arbitration as the sole and final remedy. Because the CBA provides for binding grievance arbitration and no other remedy, and because it is undisputed that Petitioner failed to exhaust his exclusive

contractual grievance remedies with respect to all issues except his denial of Class C status and union membership, his claim for breach of the CBA was properly dismissed. *Hillard v. Dobelman*, 774 F.2d 886, 887-88 (8th Cir. 1985) (affirming district court's grant of summary judgment in favor of defendants on ground that Petitioner attempted to side-step exclusive grievance procedures in CBA where Petitioner filed suit in court prior to the arbitrator's final decision); *see also Republic Steel Corp.*, 379 U.S. at 655 (holding that Petitioner was required to use CBA contract grievance procedures as exclusive mode of redress and explaining that "[i]f a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement.").

Finally, even if Petitioner's breach of labor contract claim is not barred by the statute of limitations, or because he failed to exhaust the CBA's remedies, it was properly dismissed because Petitioner has no evidence to support it. It is undisputed that after Wood and Vint observed and evaluated Petitioner's performance aboard the SEAY, they determined Petitioner's performance was unsatisfactory and that he posed a danger to his own safety and the safety of others. SUF 20, 21, 22, 23, 26, 27, 29, 30 (ER 706-709). Consequently, as of April 14, 2003, Morgan declared Petitioner ineligible for rehire. SUF 31 (ER 710). It is also uncontroverted that under the CBA, ASM and PCS has the right to refuse employees dispatched by the union. SUF 31, 79 (ER 710, 727-728). As a result, all of Petitioner's allegations to the

contrary have been repeatedly investigated and dismissed by the parties' Joint Committee, the NLRB, the Coast Guard, an Arbitrator, and even rejected by Petitioner's own union. Additionally, Petitioner has appealed these decisions and not a single appeal has resulted in a decision favorable to Petitioner.

Any claim by Petitioner that he was sent home on October 2004 before he was informed that he was not eligible for hire FAC, 19(F) (ER 8) is belied by Petitioner's admissions that as of August 21, 2003 he knew he was on no-hire status. SUF 39 (ER 713).

D. Petitioner Does Not Seek Review Of Summary Judgment On His Claim Of Tortious Discharge In Violation Of Public Policy.

Under Supreme Court Rule 14(a), "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14(a). Here, Petitioner did set out in his Petition any challenge to summary judgment on his tortious discharge in violation of public policy claim. Accordingly, writ review should not be granted as to that claim.

Nonetheless, the Ninth Circuit and District Court properly granted summary judgment on Petitioner's tortious discharge claim. In order to defeat summary judgment, Petitioner was required to demonstrate his participation in the protected activity caused the adverse employment action. *Morgan*

v. Regents of the University of California, 88 Cal.App.4th 52, 69 (2001). Respondents' only action towards Petitioner was deeming him ineligible for rehire in April 2003. At that time, Petitioner had not engaged in any activity protected by California Labor Code Section 6310(a)(1). In other words, all of Petitioner's complaints to the NLRB, the District Court to compel arbitration, and the Coast Guard proceeding occurred after, not before, he was deemed ineligible for rehire. Thus, there is no, and there cannot be, a causal connection between his alleged protected activity, and the retaliatory act. *See Kortan v. California*, 5 F.Supp. 2d 843, 853 (C.D. Cal. 1998), *aff'd*, 217 F.3d 1104 (9th Cir. 2000); *Allen v. Mich. Dep't of Corrections*, 165 F.3d 405, 413 (6th Cir. 1999). Without such a connection, Petitioner's claim necessarily failed.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that Petitioner's request for a writ of *certiorari* to review the decision of the Ninth Circuit Court of Appeals be denied in its entirety.

Dated: December 4, 2008

Respectfully submitted,

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